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No. 91-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC., and COMMODORE AVIATION, INC.,

Petitioners,

—v.—

MARIA BERNARDA ALVAREZ, as Personal Representative of the Estate of Amanda Maria Alvarez, Deceased, and on behalf of PEDRO P. ALVAREZ and MARIA BERNARDA ALVAREZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

This case presents the precise problem which Petitioners sought to have the Court prevent by granting review in the petition for a writ of certiorari in *Aerovias Nacionales de Colombia v. Calderon*, No. 91-418, 112 S. Ct. 376 (1991), *denying cert. to*, 929 F.2d 599 (11th Cir. 1991). A small group of federal district court judges in the Southern District of Florida are thwarting the intended goals of the Warsaw Convention and the Congressional objectives set forth in the multidistrict litigation procedures which are intended to assure the "just and efficient conduct" of civil actions involving common questions of fact (28 U.S.C. § 1407). These judges continue to hold that the cause of action created by the Warsaw Convention is not exclusive, in order to deprive a defendant of the right to removal.

In refusing appellate review of these decisions, the Eleventh Circuit is condoning this conduct. The umbrella of non-reviewability of remand orders set forth in 28 U.S.C. § 1447(d) is being used to shield from review at any time a pre-remand decision by a district court that the Warsaw Convention cause of action is not exclusive.

Respondents recognize in their Opposition Brief that the issue of the exclusivity of the Warsaw Convention cause of action is an important one but argue that appeal of a remand order is not a proper avenue of review.[1] Opp. Brief at 2, 13. Respondents miscomprehend Petitioners' argument. What must be reviewed is the Eleventh Circuit's consistent failure to review the lower courts' decisions, made **prior** to remand, that the Warsaw Convention cause of action is not exclusive.

Respondents misread *Waco v. United State Fidelity and Guaranty Co.*, 293 U.S. 140 (1934). *Waco* **does** provide an avenue for review of pre-remand decisions which affect the substantive rights of the parties, such as the decision at issue in this case. As in *Waco*, the decision of the District Court here, although only entered as part of a "single decree", in effect encompassed two orders. First, the District Court concluded that the Warsaw Convention cause of action is not exclusive and second, upon the basis of the first decision, the District Court then held that it lacked jurisdiction and remanded the action to state court. "[I]n logic and in fact the decree", that the Warsaw Convention cause of action is not exclusive, "preceded that of remand and was made by the District Court while it had control of the cause." *Waco*, 293 U.S. at 143. It is this order which was the subject of the appeal and not the order of remand.

Interestingly, Respondents now argue that the District Court decision "did not finally *resolvs*[*sic*] the issue of

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1 Respondents further argue that review especially is not proper because "there is pending before this Court a petition for a writ of certiorari" (Opp. Brief at 2) in *Rein v. Pan American World Airways, Inc.*, No. 91-259. The Court, however, denied the certiorari petition in *Rein* on October 15, 1991, 112 S. Ct. 331 (1991).

whether or not the Warsaw Convention applies to the case because this can still be raised as a defense . . . in the state court." Opp. Brief at 12. The issue, however, is not whether the Convention applies, because it indisputably does, but rather what is the effect of the Convention's application to the rights of the parties. Respondents have failed to address the crux of the matter, namely, that the District Court's exclusivity decision affects the substantive rights of Petitioners and may be conclusive in the state court proceedings.

If the Court does not grant review, the Eleventh Circuit will not have an opportunity to provide guidance to the district courts within its jurisdiction as to the exclusivity of the Warsaw Convention cause of action in a case involving "international transportation" as defined by the treaty. Therefore, the conflict in the Southern District of Florida on this question, which presently exists, will only be perpetuated.

Virtually every other action arising out of this accident (approximately 122) will be litigated against Petitioners and the United States in the MDL proceeding pending before the Honorable Thomas C. Platt, Chief Judge of the United States District Court for the Eastern District of New York, to whom the 122 cases have been assigned by the Judicial Panel on Multidistrict Litigation.[2] The chaos which will result in this litigation, and other similarly situated litigation,[3] if the Court does not review this case is best exemplified by the comments of Chief Judge Platt at a pretrial conference held on November 15, 1991. Chief Judge Platt expressed grave concern that the situation created by the Southern District of

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2 Chief Judge Platt also is the judge to whom all cases arising out of the *Pan Am/Lockerbie* disaster have been assigned by the MDL Panel.

3 Similar issues have arisen in the *Pan Am/Lockerbie* litigation, where Chief Judge Platt recently noticed the same problem created by the Southern District of Florida in refusing to recognized the exclusivity of the Warsaw Convention cause of action, and in *Galbiati, et al. v. Independent Air, Inc., et al.*, No. 91-618 (S.D. Fla. Apr. 24, 1991), *appeal dismissed*, No. 91-5466 (11th Cir. Oct. 3, 1991), which involves over 120 actions arising out of the crash of an aircraft in The Azores, Portugal, en route from Italy to the Dominican Republic.

Florida has resulted in cases arising out of the same air disaster being litigated on parallel tracks in two different jurisdictions, one federal and one state. If the conflict between the various judges of the Southern District of Florida as to the exclusivity of the Warsaw Convention cause of action is not resolved, this will result in at least two trials being required involving the same issues, but applying different legal principles. Such a result is directly contrary to the purpose of the MDL procedure and the goal of uniformity expressed in the Warsaw Convention.

The reviewability issue presented in the petition herein should be resolved by the Court to prevent the selective geographical undermining of the Warsaw Convention. The Court, therefore, should cut through the procedural barbed wire of 28 U.S.C. § 1447(d) and decide whether the Eleventh Circuit is correct in refusing to recognize the non-exclusivity decision of the District Court as an appealable final collateral order under *Waco* and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), notwithstanding that the decision preceded a remand order.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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